

# Michigan Journal of International Law

---

Volume 7 | Issue 1

---

1985

## The Two-Way Mirror: International Arbitration as Comparative Procedure

Andreas F. Lowenfeld  
*New York University School of Law*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Dispute Resolution and Arbitration Commons](#), and the [International Law Commons](#)

---

### Recommended Citation

Andreas F. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 MICH. J. INT'L L. 163 (1985).

Available at: <https://repository.law.umich.edu/mjil/vol7/iss1/11>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# The Two-Way Mirror: International Arbitration as Comparative Procedure

Andreas F. Lowenfeld\*

Arbitration of international commercial disputes means different things to different observers or participants. Some view it as a speedy and inexpensive alternative to lengthy litigation.<sup>1</sup> Others view arbitration as a way to deflect intense antagonism, something like mediation or counseling, where the sharp edges of law and fact are smoothed over in a resolution that all concerned can accept.<sup>2</sup> Still others view arbitration just like litigation, except that the jurisdictional obstacles have been avoided.<sup>3</sup> My own perception—having sat in my professor's (i.e., observer's) chair even as I was a participant in numerous international arbitrations—is different from each of these perceptions. I see international arbitration—especially the typical arbitration with two party-appointed arbitrators from different states and a chairman from a third state—on the one hand as an exercise in comparative procedure, and on the other hand as source and evidence of a norm of international conduct which may be different from (though similar to) the law of any given nation-state.

Most serious writing about arbitration follows the “law review format,” which I take it means never say anything without a source, produce a great many footnotes, and cite a maximum of reported appellate decisions. It is certainly

\* Charles L. Denison Professor of Law, New York University School of Law; A.B. 1951, Harvard University; LL.B. 1955, Harvard Law School. Professor Lowenfeld is a former deputy legal advisor to the United States Department of State and an associate reporter for the Restatement of Foreign Relations Law (revised).—eds.

1. See, e.g., Domke, *International Arbitration of Commercial Disputes*, in 2 PROCEEDINGS OF THE INSTITUTE ON PRIVATE INVESTMENT ABROAD 131 (R. Wilson ed. 1960).

2. See Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Civilian Judicial Creativity*, 55 TULANE L. REV. 1, 2 (1980); David, *David on Arbitration in the International Trade*, in THE ART OF ARBITRATION 89, 91–92 (J. Schultz & A. van den Berg eds. 1982).

3. E.g., Goff, *Presenting Evidence Under English Law*, 41 ARBITRATION 54, 55 (1974).

possible to do this in writing about arbitration,<sup>4</sup> but I believe only at considerable cost. Discussing arbitration through cases in the law reports has the same failing, I submit, as most of American administrative law, which does not reveal much about how administrative agencies function but tells a great deal about judicial control of administrative action—a quite different subject.<sup>5</sup> Similarly, one may write in law review format about actions to compel or enjoin arbitration, to stay litigation pending arbitration, and to confirm, enforce, or set aside arbitral awards. All of these topics are interesting and important; none, however, tells very much about arbitration itself. This article undertakes to explore the process of international arbitration—the main event, as it were—rather than what comes before or after, which may well take place in court but if all goes well should not take place at all.

Writing about the main event has certain drawbacks. Arbitration is—almost by definition—nearly always confidential, and even when awards are published, they tend to be redacted in such a way that the process and method on which I want here to concentrate are very difficult to discern.<sup>6</sup> The secondary literature tends to be of the “how to do it” character—useful tips on drafting clauses, choosing a forum, or presenting cases<sup>7</sup>—but not reflective. Thus one is left largely to his own resources—in my case about a decade of experience, primarily as arbitrator, occasionally as adviser. This article is not “social science,” in the sense of being founded on a statistical sample; nor is it “law review format,” in the sense of permitting “cite & substance” control. It is, however, an attempt to subject international arbitration to academic inquiry, by which, needless to say, I do not mean what journalists mean by that term. I want to try to put on paper some of what I have learned as arbitrator, not just about arbitration, but about law overall.

In particular, by focusing on selected aspects of the international procedure of international arbitration, as well as on different approaches to the problem of choosing the source of the law to be applied, I hope to give the outsider some feeling for the process, and some perception of how international arbitration is different both from domestic arbitration and from litigation in national courts. I have an additional purpose, as well, however, though I want to be sure not to

4. See, e.g., M. DOMKE, *COMMERCIAL ARBITRATION* §§ 24:00–24:02 (Wilner rev. ed. 1984); J. ROBERT, *L'ARBITRAGE: DROIT INTERNATIONALE PRIVE* 132–71 (5th ed. 1983); A. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* (1981); Hunter, *Arbitration Procedure in England: Past, Present and Future*, 1 *ARB. INT'L* 82 (1985).

5. See, e.g., K. DAVIS, *ADMINISTRATIVE LAW TREATISE* (2d ed. 1978); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965); B. SCHWARTZ, *ADMINISTRATIVE LAW* (2d ed. 1984).

6. See, e.g., J. LEW, *APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* (1978).

7. See, e.g., Aksen, *Drafting Arbitration Clauses in International Agreements*, in *ARBITRATION AND THE LICENSING PROCESS* 3 (R. Goldscheider & M. de Haas eds. 1984); Branson & Tupman, *Selecting an Arbitral Forum: A Guide to Cost-Effective International Arbitration*, 24 *VA. J. INT'L L.* 917 (1984).

sound too pretentious about it. I hope that focusing on the record, on discovery, on examination of witnesses, and on choosing a choice of law will shed some light on the various legal systems from which the techniques of international arbitration have been drawn, and will raise for each reader some questions about the inevitability of the system to which he or she is accustomed.

Of course, both in the European and in the Anglo-American system, arbitration is somewhat different from ordinary civil litigation, but it is clear that the litigation model is the point of departure to which all comparisons and analogies (conscious and unconscious) refer. If domestic arbitration is a derivative of domestic litigation, one might suppose that arbitration involving participants from different states would be a synthesis of the derivatives. In substantial measure, I think that is true, and is reflected in the experience on which this paper is based. International arbitration is thus a two-way mirror: the participants in a legal system see themselves as others see them, and they get an idea of how others approach tasks similar to their own.

A bit of definition may be in order. By international arbitration, I mean what the U.S. Supreme Court had in mind in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*,<sup>8</sup> and a decade earlier in *Scherk v. Alberto-Culver Co.*<sup>9</sup> Parties from different states make a contract (or a series of related contracts); the contract provides that all (or specified) disputes that may arise under the contract shall, if not settled by negotiation, be submitted to an arbitrator or panel of arbitrators; and usually the contract goes on to say how the arbitrators are to be chosen, where the arbitration is to take place, and whether particular rules of procedure are to be applied, such as those of the International Chamber of Commerce, the Grain and Feed Trade Association, the American Arbitration Association, or the London Court of Arbitration.<sup>10</sup> Sometimes, the agreement to arbitrate is more elaborate, with choice of law clauses, language clauses, enforcement provisions and waivers of various kinds. It is also possible, though in my experience not as common as one might think, for an agreement to arbitrate to be concluded after a dispute arises, i.e., not as part of the contract. Another variation may be that the panel is constituted before a particular dispute arises, for example by a trade association. But the basic pattern is constitution of an arbitral panel after a dispute arises, pursuant to an arbitral clause contained in a transnational contract, a demand for arbitration submitted by one party, and a response thereto by the other party. The arbitrators may be "commercial men," which might include women but clearly excludes lawyers;<sup>11</sup> more commonly

8. 105 S. Ct. 3346 (1985).

9. 417 U.S. 506 (1974).

10. For a convenient collection of these and other arbitration rules, see 4 J. G. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS* 413-550 (1979). See also E. COHN, M. DOMKE & F. EISEMANN, *HANDBOOK OF INSTITUTIONAL ARBITRATION IN INTERNATIONAL TRADE* (1977).

11. See *Pando Compania Naviera S.A. v. Filmo S.A.S.* [1979] Q.B. 742, at 746.

outside the maritime field and some trade associations, they are law trained, including retired judges, practicing lawyers, and law professors.<sup>12</sup>

Typically, the arbitrators come from different states, and the chairman (or neutral arbitrator) comes from a third state, which may or may not be the situs of the arbitration. The most common pattern is for each party to choose one arbitrator; thereafter either the two arbitrators so chosen choose the presiding arbitrator or chairman, or an appointing authority such as a national council designated by the International Chamber of Commerce designates the chairman.<sup>13</sup> Governments—or more likely government-owned entities such as national grain marketing boards or oil companies—may be parties, and are treated like other litigants. At the most general level, to be developed through this article, the law applied by the arbitrators is civil or commercial law, not public international law.<sup>14</sup>

## I. PROCEDURE

One striking difference between Anglo-American and European conduct of civil litigation is the difference in the role of the judge on the one hand, and the lawyers on the other.<sup>15</sup> In the American, and perhaps even more in the English model, the judge is a kind of umpire, with no responsibility to find out for himself what went on between the parties, no expectation that he will question the witnesses or seek out evidence that may help to illuminate the controversy. In the European model, in contrast, the judge (or one of a panel of three judges) is in charge of preparing the dossier and gathering the evidence, and he or she usually takes the lead in questioning the witnesses.<sup>16</sup> In the Anglo-American system, everything points to the trial, i.e., an uninterrupted period during which (putting exceptions aside) the judge, the lawyers, and the parties or their representatives are expected to put full time into the case, establishing a record on the basis of which the case—or at least the factual part of the case—will be decided. In the European model of a civil litigation, there is normally no trial as such, though

12. See, e.g., *Mitsubishi Motors*, 105 S. Ct. at 3358 n.18.

13. There are usually provisions in arbitral rules or in the arbitration clause about what happens when one side does not appoint an arbitrator or the two party-appointed arbitrators cannot agree on the third arbitrator. I want to concentrate here, however, on what happens in an arbitration that runs its course, and not be diverted by various "what if" considerations.

14. Thus, I do not here discuss state-to-state arbitration, which is not as different from the present topic as might be supposed, but is sufficiently different to be beyond the scope of the present article.

15. I do not here address the even more striking difference between American and other litigation that results from the role of the jury. Since the focus here is the influence of the litigation model on the conduct of an arbitration, it is trial before a judge without a jury that serves as the proper basis for comparison.

16. Needless to say, there are significant variations among the different countries, some of which are reflected in the discussion that follows. As generalizations go, however, the text seems substantially accurate.

witnesses may be heard and evidence may be submitted (and demanded) during the time the case remains open, and argument by counsel will be scheduled when the fact-gathering is concluded.<sup>17</sup> This critical difference, not generally understood by lawyers brought up in the American or English tradition, forms an important background, I believe, for all of the discussion that follows.<sup>18</sup>

### A. *The Record*

Though the most important sets of rules concerning international commercial arbitration (outside the maritime field) make hearings optional,<sup>19</sup> hearings seem to be dispensed with only when neither party and none of the arbitrators desires a hearing, which is quite rare.<sup>20</sup> Hearings held in stages, however, are common—say the first stage for claimant's evidence and the second stage for respondent's evidence, or the first stage with evidence by both sides on one issue, the second stage with evidence on other issues, perhaps a third stage for a counterclaim or argument ("pleading" in European usage) by counsel.

One interesting difference between arbitration, American style, and arbitration, European style, concerns the record of the proceedings. In an arbitration in the United States with American counsel and arbitrators (even if one or more parties are foreign), there is nearly always a stenographic transcript, including both questioning of witnesses and argument of counsel. The transcript is virtually indistinguishable from the transcript of a trial at law, except that objections to evidence are very infrequent. American lawyers feel comfortable with transcripts (though they are not cheap): if there are post-hearing briefs or memoranda, the transcript can be used to refresh the arbitrators' recollections, and to reply to the assertions of one's adversaries. Whether arbitrators themselves use the transcript

17. If this seems strange to U.S.-trained readers, it is worth pointing out that the procedure is not so different from the practice in admiralty—perhaps the field of municipal law that is most international in character.

18. Of course, in detail the procedure of each civil law country is different, just as are procedure in the United Kingdom and the United States, and, indeed, procedure in New York and New Jersey. For a brief explanation of the historical reasons for the different development between the civil and the common law traditions, see R. DAVID, *ENGLISH LAW AND FRENCH LAW* 56–64 (1980). For convenient introductions in English to the procedure of selected countries, see R. GINSBURG & A. BRUZELIUS, *CIVIL PROCEDURE IN SWEDEN* 270–98 (1965); M. CAPPELETTI & J. PERILLO, *CIVIL PROCEDURE IN ITALY* 173–240 (1965); P. HERZOG, *CIVIL PROCEDURE IN FRANCE* 280–86 (1967); and 2 E. COHN, *MANUAL OF GERMAN LAW* 204–11 (2d ed. 1971).

19. *E.g.*, RULES OF CONCILIATION AND ARBITRATION OF THE ICC art. 14(1), (3) (1975) [hereinafter cited as ICC RULES]; UNCITRAL Arbitration Rules arts. 19(2), 25(1), in 31 U.N. GAOR Supp. (No. 17) at 35, U.N. Doc. A/31/17 [hereinafter cited as UNCITRAL Rules].

20. It is not so rare, however, for a hearing to be devoted solely to legal argument, either when the facts are not in dispute, or when legal issues can usefully be determined first, thereafter allowing the parties to settle their dispute in line with the legal guidelines given by the arbitrators. The discussion in the text assumes a hearing devoted at least in part to determination of facts.

is hard to say; my impression is that they use them far less than the care of counsel would suggest. "Let the record show . . ." this or that in a fat transcript is rarely significant, though, of course, some record of the proceedings is essential if the arbitrators are to reach a just result.

International arbitrations tend to reflect judicial procedure in the state where the arbitration is held, particularly if the chairman comes from that state. For example, in France, the judge ordinarily summarizes the testimony of the witnesses, typically by dictation into a recording machine, and the summary is submitted to the witness for signature, with such corrections as he or she chooses to make.<sup>21</sup> In Zurich,<sup>22</sup> the court generally employs a *Gerichtsschreiber* (literally "court writer") who is not trained in shorthand but is generally a young lawyer starting out on a judicial career, and ordinarily it is he or she who maintains a protocol of the proceedings.<sup>23</sup> The French record of hearing can be very compact—highlights or synthesis of the witnesses' testimony; in Zurich, it seems, the report must be a detailed (though not verbatim) record of the questions and answers; tape recorders may be used only for the arguments of counsel, not for testimony. I was fascinated by the difference in preparation of the record in two

21. See *Nouveau Code de Procédure Civile* 194–195 (Dalloz 1984) (statements of parties); *id.* at arts. 219–220 (statements of witnesses); see also *id.* at arts 1461 (records to be kept by arbitrators).

22. In Switzerland, most substantive law is federal, but procedural law varies from canton to canton. Zurich and Geneva (and to a lesser extent Basel) are the centers for international arbitration. If the Concordat concerning arbitration, see *infra* note 23, is applicable, local procedure at the seat of the arbitration may be disregarded.

23. See *Gerichtsverfassungsgesetz* vom 13. Juni 1976, §§ 141–154 (Canton of Zurich, Switzerland) (Law of Court Procedure of 1976) [hereinafter cited as GVG].

For the requirement that a record of an arbitral proceeding be kept corresponding to the procedure before ordinary courts, see *Zivilprozessordnung* vom 13. Juni 1976, § 250 (Canton of Zurich, Switzerland) (Code of Civil Procedure) [hereinafter cited as ZPO] and H. STRAULI & G. MESSNER, *KOMMENTAR ZUR ZÜRCHERISCHEN ZIVILPROZESSORDNUNG* 498–99 (2d ed. 1982).

Under article 24 of the Swiss Concordat of March 27, 1969 concerning arbitration, applicable in a majority of Swiss cantons including Geneva and Basle but not (prior to July 1, 1985) Zurich, a record is required to be kept, but the parties or the arbitral tribunal may agree on the manner of recording the proceedings. See T. RUEDE & R. HADENFELDT, *SCHWEIZERISCHES SCHIEDSGERICHTSRECHT* 244–45 (1980). But see P. JOLIDON, *COMMENTAIRE DU CONCORDAT SUISSE SUR L'ARBITRAGE* 341 (1984) (casting doubt on the requirement of minutes in arbitration conducted under the Concordat because the analogy to ordinary civil procedure is lacking).

For an interesting instance where failure to include in the protocol correspondence between the arbitral tribunal sitting in Zurich and the Court of Arbitration of the ICC acting pursuant to its review authority under article 21 of the ICC Rules led to annulment of an award, see Decision of June 29, 1979, Supreme Court, Zurich (Obergericht) 76 *Schweizerische Juristenzeitung* 301 (note F. Wiget 302–03) (1980) and 78 *Blätter für Zürcherische Rechtsprechung* 34 (1980).

For a discussion of the requirements of arbitration in Zurich in relation to cantonal procedure, written before the enactment of the new GVG and ZPO but, apart from the section references still valid, see Wiget, *Fragen der Verfahrensgestaltung vor Gelegenheitsschiedsgerichten nach zürcherischem Zivilprozessrecht*, in *FESTSCHRIFT FÜR MAX GULDENER* 367 (M. Kummer & H. Walder eds. 1973).

particular cases in which I sat, and by the difference of both from the American pattern.

In the first case, heard in Paris, the chairman, a French lawyer, dictated summaries of testimony at regular intervals, which were transcribed from cassettes while the hearing continued; after a short recess following appearance of the last witness, it proved possible to submit the summaries to the witnesses for their approval, so that the first meeting of arbitrators to consider the case could be held right then and there with the complete record—twelve typewritten pages for two days of hearing—in hand. The president of the tribunal in this case happened to be very good at capturing the essence of the witnesses' statements—better, no doubt, than the witnesses themselves. For whereas the witnesses had stammered or mumbled, occasionally contradicted and then corrected themselves, omitted relevant facts and then come back to them under prodding from counsel or questioning from the panel, the arbitrator produced a neat, logical, perfectly grammatical, and even elegant statement of the position of each witness or party.

The record of a hearing prepared in this manner comes out something like a collection of affidavits that might be prepared by an American lawyer, except that it reflects responses to questions and the preparer of the record has no partisan interest. If the author is skillful, if the witnesses have told the truth as they saw it, and if no issue of credibility has arisen, the record tends to be more useful (or at least more convenient) than an American transcript; if there is conflict of testimony or a witness changes his story under cross-examination (of which more below), then the record created by the judge/arbitrator may be too distilled and organized to accurately reflect what was said, and how.

American lawyers' initial reaction to this method of creating a record tends to be one of shock, with overtones of concern about due process. I think that on reflection this reaction may change. Clearly if the objective is to preserve exactly what was said at the hearing, the French method here described is unsatisfactory. If, on the other hand, the objective is to find out what really happened that was important to the controversy—i.e., what did the parties intend, what did they achieve, what outside causes intervened—the value of testimony, American style, may be overrated. If an oral hearing is seen as supplementing and explaining the written evidence, as enabling the arbitrators to place faces and impressions alongside the reams of paper that characterize most commercial disputes, and as focusing the panel members' attention on the same subject at the same time, its essential value may well be capable of being captured by the summary, Paris style.

In the second case, heard in Zurich, a partner in a major Swiss law firm was chairman of the Tribunal, and one of the firm's associates filled the role of *Gerichtsschreiber*. The result was a record somewhere in between the French and American methods: a record almost as detailed and long as a transcript, yet not a verbatim rendition of what was said. The fact that the minutes were very detailed led to corresponding time spent by the arbitrators, counsel, and witnesses (plus



translators) in reviewing the draft protocol. It was hard to tell how much of the process of "correcting" the minutes really reflected misunderstanding or error on the part of the court writer; my impression is that there was considerable effort by the participants to improve their style, grammar, or consistency as it would be reflected in the written protocol, an effort that surely would not have been undertaken if the participants had been dealing with a verbatim transcript. It seemed to me as arbitrator that the focus on the protocol diverted attention from the controversy itself.

I found more helpful the use of a so-called "witness statement," which (though not particularly characteristic of Swiss, or Zurich, procedure) was used to good advantage in the Zurich case. Each principal witness was required to distribute in advance of his appearance a prepared statement of his testimony in narrative form, with reference where appropriate to documents already submitted or accompanying the statement, and with indication of those parts of the statement that reflected personal recollection, and those parts that reflected study of the files or reports from others. The witness statements became the basis of questioning during the witnesses' appearances at the hearing. Afterwards, the witness statements, together with the documents to which they referred, and each arbitrator's notes as to inconsistencies in the statements or as to weaknesses revealed during the questioning, turned out to be the effective record—reflecting the common experience of each of the arbitrators and tying together the documents, the written arguments, and the many days of hearings. I, for one, wondered whether this would not be a useful device in our ordinary domestic litigation—whether, in other words, both European and American lawyers would benefit from a technique devised—or at least adapted—for a proceeding designed to bridge several systems.

### *B. Discovery*

It is often said by Europeans that discovery is the American lawyer's favorite indoor sport, that such discovery is in the nature of a fishing expedition, and that American lawyers bring lawsuits first, and gather facts afterwards. American lawyers, on the other hand, tend to believe that Europeans—in this context including the British—just don't understand discovery at all; and moreover, that neither do arbitrators.

My impression is different from all of these perceptions. In the first place, I think the idea that Americans sue first, then build their case, is much exaggerated. It may be that when a person is wheeled unconscious into the emergency operating room of a hospital and something goes wrong during the operation, discovery in aid of litigation is necessary to learn the name of the attending physicians and nurses; it is certainly true that in product liability litigation, especially where design defects are alleged, plaintiffs seek access to defendants' files to support allegations that at the outset may be rather general. In commercial

disputes, however, I believe both sides generally know quite well what the basis of their claim is and what defenses the other side is likely to raise. Where discovery is useful is where one side or the other has a duty to mitigate—e.g., to resell rejected merchandise or to buy merchandise of the kind not delivered—and market quotations are not really available. Usually this information is forthcoming—if not freely offered, when invited or ordered to be produced by the tribunal, as it would be in a European lawsuit. I have several times been in arbitrations in which an inference was drawn from the failure to produce a document—either one requested by the adversary or one alleged to exist by the non-producing party but not submitted. I have never had the feeling that if only the arbitrators had power like those of a U.S. judge under Rule 37 of the Federal Rules of Civil Procedure,<sup>24</sup> we could get to the bottom of a case that thus far had left us stumped.

The European custom of initiating a lawsuit by coupling assertion of facts or rights with references to documents or expected testimony of a witness or party seems to be the model for initiating an international arbitration. Thus, the statement of claim typically has a documents annex that reproduces not only the contract but the principal documents to be relied on by claimant. The response—especially if coupled with a counterclaim—typically reproduces many of the same documents, as well as a few others that claimant chose not to introduce at the outset. Additional documents follow in each party's first written submission—such items as invoices paid or unpaid, inspection reports, minutes of meetings between the parties or with non-parties. By the time of the hearing, most of the necessary documents have been exchanged and submitted to the arbitrators. A few additional documents show up at the hearing, one side complains that they were not furnished on schedule but the objection is disregarded, and then the other side comes up with a few more papers—rarely the “smoking gun.” All of this takes place with some instructions from the tribunal regarding time for submissions, and translations where necessary. Occasionally a request for documents from one party will be submitted to the other party through the chairman of the tribunal, possibly with a covering letter indicating that the tribunal (or the chairman) regards the request as justified—not the same as an order to produce.

What if one party makes an assertion based on a document described but not produced? Or if a party denies something that could be proved or disproved by a document in its possession? Step one is for the opposing party to seek an order for disclosure from the tribunal, or from the chairman. If the document in question is in the hands of a party, and if it is specifically described—“minutes

24. FED. R. CIV. P. 37. If a party fails to comply with an order to make discovery, rule 37 provides that the court may impose appropriate sanctions, including treating pertinent facts as established, refusal to allow the disobedient party to support or oppose designated claims or defenses, dismissal of the proceedings, entry of a default judgment, and contempt of court.

of the meeting of November 5," or "letter to Mr. X of February 9"—an order to produce is fairly easy to obtain, though some arbitrators don't like to issue orders when there is no force behind them, for fear that disobedience to an order casts doubt on the respect for the arbitral process as a whole. Those arbitrators prefer to "invite" the party to disclose the document, or to "indicate" that the tribunal regards the document as important and rejects the reason given for non-production.

What if the document sought is still not produced? In theory, the demanding party could seek assistance of the court at the place where the arbitration is held; in practice, I believe such a step is very rare, and would not be welcomed by the tribunal, because resort to the court delays the proceeding and results in (and reflects) loss of control of the proceeding by the arbitrators. Moreover, while the court may have jurisdiction over the parties, it would inevitably be involved in the problem of foreign discovery, a problem no court is happy to undertake. If arbitration is a way out of jurisdictional disputes, resort to courts for discovery of evidence located outside the forum state is a way to reintroduce jurisdictional disputes, often in a context where the court—as a neutral forum—has no interest in the underlying controversy.

The better remedy, and the more common one, is for the tribunal to announce that it will presume that the document confirms the assertion of the demanding party, or fails to confirm the assertion of the non-producing party, but that this presumption is tentative, subject to being withdrawn if the document is produced within a designated period.

For example, in one tri-continental arbitration in which I served as an arbitrator, the principal issue was whether some agricultural machinery sold by the claimant to the respondent performed satisfactorily in the adverse climate in which it was to be used. Buyer was from a developing country, and a team of professors engaged by the U.S. Government that had surveyed the area had prepared a report dealing, *inter alia*, with the performance of the machinery in question. The report, which gave the machinery high marks, had been circulated in draft for comment both to the manufacturer (claimant) and to the buyer (respondent). Evidently the buyer thereafter advised the survey team that it was engaged in a controversy about the machinery and that no further drafts of the report should be made available to the manufacturer. In the arbitration, the claimant introduced the favorable report in its draft form and requested that the final report be furnished by respondent. The respondent refused, asserting governmental privilege. Rather than ruling on a difficult issue of privilege under the law of a country whose law on that subject would probably be impossible to ascertain, the chairman advised the parties that the tribunal would treat the unfinished, unsigned report as if it were a final, signed report unless within a stated period the final report was produced. When the final report was still not forthcoming, there was no issue of sanctions, no discussion of whether respondent actually had the privilege which it claimed. The tribunal simply ac-

cepted the draft report, and as interpreted by the tribunal's expert, it became an important element in decision of the case.

Not every case involves so easy an inference—that the final version of a report is the same as a draft. But the procedure illustrated is, I believe, acceptable and can be applied in a variety of contexts, provided the members of the tribunal are prepared to work together. If one of the arbitrators disagrees with the procedure, or with the proposed inference, the issue becomes troublesome, because arbitrators usually prefer not to disagree in public, at least until the case is over. One way around such difficulty is to delegate “procedural” decisions to the chairman, but that, too, creates problems.

It is perhaps true that certain information in the hands of third parties which might be placed before the decision maker in American litigation, but generally not in litigation in United Kingdom or France or Switzerland, will not be furnished to international arbitrators. And there is nothing in international arbitration procedure comparable to an examination before a trial—i.e., to an opportunity for counsel to take the deposition of his adversary's potential witnesses<sup>25</sup>—a device that so far as I know is only used in the United States.<sup>26</sup> But I am not sure whether this is a shortcoming of arbitration (domestic as well as international) or suggests that depositions are over-used in the United States.

Again I resort to anecdote rather than statistical survey. In a recent arbitration which was conducted under the rules of the American Arbitration Association<sup>27</sup> but involved an international sale, the president of the company that had manufactured the disputed merchandise had just finished his testimony in chief on behalf of seller, describing how the product was manufactured, what training his workers and supervisors received, and how quality control was maintained. Counsel for the purchaser, which had rejected the merchandise, said he would have difficulty conducting a cross-examination, because he had not had the benefit of studying the witness' deposition. In fact, with benefit of only a few minutes recess, he conducted a first-class, well-prepared cross-examination, bringing out points the witness had sought to de-emphasize, and demonstrating weakness where there was weakness in the witness' testimony. To me, the episode demonstrated the reverse of what counsel had said: not that arbitration was

25. See, e.g., FED. R. CIV. P. 27–32; N.Y. C.P.L.R. §§ 3101–3117.

26. I exclude the kind of examination before trial designed to preserve the testimony of someone in failing health or likely to be unavailable to give evidence at the time of trial. See, e.g., United Kingdom Rules of the Supreme Court, Ord. 39, r. 1. (1985).

27. Apart from the differences already noted concerning the record of the proceedings, and a quite different fee schedule, three principal differences between AAA and, say, ICC arbitrations may be noted. First, under AAA rules all of the arbitrators are usually appointed by the Association from a list, so that there are rarely party-appointed arbitrators. Second, the AAA seems to make an effort to see that the panel not be composed entirely of lawyers, while “international rules” usually result in all law-trained arbitrators. Third, the AAA discourages detailed written awards, whereas the ICC and other international bodies encourage or require them.

inadequate because it did not provide for pre-hearing depositions, but that depositions were not—or at least not always—an essential part of the litigation process. Had I been sitting downtown as a judge instead of midtown as an arbitrator, I would have been perfectly satisfied with the information presented by the parties through submission of documents and testimony at the hearing. If arbitration (domestic and international) is in this respect significantly different from American-style litigation and closer to litigation in other countries, the lesson may be for those who think about the conduct of civil litigation in the United States.

I do not, of course, suggest a return to the “sporting theory” of litigation,<sup>28</sup> nor is the lesson I propose necessarily relevant for litigation between parties who do not know each other—for example in accident or product liability cases—for litigation in which the state of a person’s mind may be critical, such as defamation cases involving public figures. In cases arising out of contracts, however—a subset that includes virtually all of international arbitration but also much of commercial litigation—arbitration is a fairly persuasive demonstration that much of American-style discovery might be simplified or eliminated altogether, without significant sacrifice of the ultimate objective, i.e., placing an accurate picture of the essential facts before the decision maker.<sup>29</sup>

### *C. Hearing the Witnesses*

Perhaps the area of greatest difference between the common law and civil law systems of civil litigation—and the area where the American and English models are closest together—is the taking of evidence at the hearing. As already noted, the idea of a hearing itself in an international arbitration is largely drawn from the common law model, though it is understood that the sessions may be separated by weeks or months—partly to accommodate the schedules of the participants who come from distant lands, partly because the hearing is not so firmly entrenched as the climax of the proceeding as it is in a common law trial. But assuming that first one side and then the other presents its witnesses,<sup>30</sup> what is the role of the judge (arbitrator) and what is the role of counsel? English and Ameri-

28. For a discussion of the sporting theory of litigation, see C. WRIGHT, *THE LAW OF FEDERAL COURTS* 540 (4th ed. 1983) and the sources there cited.

29. Note that this suggestion is consistent with recent reforms of the Federal Rules of Civil Procedure calling for greater control of discovery by the trial judge. See FED. R. CIV. P. 16, 26(b)(1), 26(b)(8), 26(g); Notes of the Advisory Committee, 97 F.R.D. 165 at 207, 217–18 (1983). Proposed section 437 (previously section 420) of the *Restatement of Foreign Relations Law* would require a court order before discovery could be demanded for evidence located in a foreign state. See *RESTATEMENT OF FOREIGN RELATIONS LAW* (Revised) § 437(1) comment a (Tent. Draft No. 6, 1985).

30. I here follow the Anglo-American terminology of calling everyone who gives evidence a witness. In the continental tradition a distinction is often drawn between witnesses, who are supposedly disinterested, and parties, who usually may be heard but whose evidence in some states is not taken under oath and is given different value.

can lawyers have been surprised to learn that in an international arbitration they had no right, and might not even have the opportunity, to cross-examine the other side's witnesses; in some instances the reverse has been true, with European counsel surprised to discover that they were expected to examine their adversary's witnesses, a function they had thought would be carried out by the arbitrators.

The general approach in Europe, as indicated earlier, is that the court does the questioning. While it is common to delegate to the counsel who presents a witness (including a representative of the party) the opportunity to help the witness bring out his or her principal points, gaps or lack of clarity in the evidence are to be brought out by the court. Opposing counsel, of course, is entitled to be present, and to suggest questions to the tribunal, but the idea that adverse counsel conducts the questioning while the court (or arbitral tribunal) sits back is unfamiliar and even unacceptable.

In anticipation of the hearing in a tricontinental arbitration a few years ago, I exchanged a series of letters with the German chairman, in which we debated the pros and cons of cross-examination. I started out in favor of cross-examination just because that was what I was used to, and the chairman started out against cross-examination, also because he was used to his own system. But both being academics for whom arbitration was a sideline, we thought it useful to think through our positions.

The contention of the chairman that the ICC rules were based on the continental tradition was unpersuasive to me. All that the rules state—precisely because they seek to embrace participants from different systems—is that the procedure is to be settled by the parties or (more commonly) by the arbitrators.<sup>31</sup> The chairman's contention that it was, after all, the tribunal whose questions should be answered, not counsel's, was harder to refute, at least at a theoretical level. The most serious objection to cross-examination, however, seemed to be of a different order. No doubt influenced by a string of courtroom dramas in the movies and by Perry Mason on television, my colleague seemed to have gained a perception common in Europe, that cross-examination pits star lawyers against unsuspecting witnesses to humiliate them and degrade the process. The chairman understood my reply that this pattern was unlikely in a commercial case, and that in any event the tribunal could certainly limit cross-examination if it became

31. Article 11 of the ICC Rules reads as follows:

The rules governing the proceedings before the arbitration shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, whether or not reference is thereby made to a municipal procedural law to be applied to arbitration.

ICC RULES, *supra* note 19, at art. 11. This provision, enacted effective in 1975, replaces an earlier provision which, absent agreement by the parties, called for application of the procedural law applicable at the place where the arbitration is held. See ICC Rules of Conciliation and Arbitration art. 16 (1955).

oppressive; he thought, however, that controlling cross-examination would also divert the attention of the tribunal from where it should be focused. "It seems to me" he wrote, "that the questioning should be left to arbitrators but that the parties or their lawyers [sic] should also have the right to put questions to witnesses after asking the chairman of the arbitration tribunal to let them do so. . . ."

I thought taking the lead in questioning the witnesses ourselves would put a burden on the arbitrators that I was not accustomed to, because it would mean learning the documentary record in advance rather than using the hearing and accompanying briefs to guide us through the facts. Though I was willing to undertake this greater level of preparation, I wondered whether I could simultaneously conduct a systematic questioning of a witness and reflect on the answers. To the extent the questioning was designed to clarify answers—for instance to explain in layman's terms what might well be technical explanations about the functioning of a machine or the working of a market—I thought the tribunal might do almost as well as opposing counsel, especially if all three arbitrators were prepared. What worried me was the prospect of a direct conflict in testimony, or (even absent a direct conflict) doubt about the truthfulness of a witness. Questioning designed to bring out contradiction in a witness' testimony, I argued, has to be to some extent tricky—leading the witness from Point A through Points B, C, and D and then back to A. Such questioning, it seemed to me, is best conducted by someone who expected, hoped, or had incentive to expose the witness; such hope or expectation or incentive is quite inconsistent with the role of an arbitrator. It seemed to me to be particularly inappropriate for a party-appointed arbitrator, whose impartiality is inevitably subject to some uncertainty; and it seemed inappropriate also for the chairman, who should always strive to conduct the proceedings from the point of view that everyone who appears before the tribunal is truthful and is doing his best to help the arbitrators. Thus, it seemed to me that abandoning cross-examination by counsel would mean giving up an element in the process of establishing the facts that would not be significant in every case but might well be critically important in some cases.

In the particular case to which this debate was prelude, a compromise procedure was worked out whereby after counsel offering a witness made his initial presentation, the tribunal would take over the questioning but opposing counsel could propose questions to be put to the witness by the tribunal, with the chairman "adopting" the questions as his own. After a while this process became cumbersome, and counsel was permitted to put the questions directly, subject to disapproval (without need for objections) by the chairman. In other cases, variations on this technique have been adopted. My impression is that cross-examination—often called something else—is gradually gaining favor in international arbitration. A consequence is that European counsel are studying the record and preparing for the hearing more carefully than they once did, in emulation of their

American counterparts.<sup>32</sup> As arbitrator, I still know I need to prepare more thoroughly for an international arbitration with a European chairman than would be necessary for a hearing in New York or London modeled on common law procedure. But I feel more comfortable in evaluating what went on in a hearing when there has been questioning by both counsel, and I believe this is taking place more and more.

Perhaps the best combination of techniques is the requirement of a witness statement, which has some of the aspects of pre-trial discovery, followed by a hearing at which the witness amplifies his statement, and then cross-examination prepared (at least partly) in advance, so that opposing counsel knows where to focus his inquiry, rather than probing at random until he finds a weak spot. Of course, whether the tribunal maintains the fiction that the cross-examination is conducted under delegation from the arbitrators, or it simply presides over questioning by opposing counsel after the proponent and the arbitrators have had their turn, there should be no doubt that the tribunal can control the proceedings, to prevent bullying, repetition, insinuations, or other abuse of the process.

## II. CHOICE OF LAW

One might suppose that someone engaged regularly in international arbitration would learn a great deal about conflict of laws as practiced in various states. After all, international arbitration (except when the arbitrators are expressly invited or required to decide *ex aequo et bono*) demands decision under law,<sup>33</sup> and by definition at least two and possibly more systems of law may be invoked to give content to this requirement. My experience is that choice of law plays a smaller role than might be expected from the large volume of scholarly writing on the subject.<sup>34</sup> This fact, too, I believe, suggests something about the law in general—

32. The appearance of teams of counsel from Paris, Amsterdam, or Frankfurt also seems more common, again in emulation of their colleagues from New York, Washington, or Los Angeles.

33. See, e.g., ICC Rules, *supra* note 19, at art. 13(3), 13(4); UNCITRAL Rules, *supra* note 11, at art. 33; Model Law on International Commercial Arbitration art. 28(3), in UNCITRAL, Report of the Working Group on International Contract Practices on the Work of its Seventh Session 6, 24, U.N. Doc. A/CN.9/246 (1984) (derived in this respect from the arbitration law of most European states) [hereinafter cited as UNCITRAL Model Law]. The Model Law is discussed and reproduced in Herrmann, *The UNCITRAL Model Law*, 1 *ARB. INT'L* 6 (1985).

34. For a comprehensive bibliography, see J. LEW, *supra* note 6, at 591–97. See also Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16 *INT'L LAW* 613 (1982); J. ROBERT, *supra* note 4, at 278–90; Klein, *The Law to be Applied by the Arbitrators to the Substance of the Dispute*, in *THE ART OF ARBITRATION*, *supra* note 2, at 189; Lando, *Conflict of Law Rules for Arbitrators*, in *FESTSCHRIFT FÜR KONRAD ZWEIGERT* 157 (H. Bernstein, U. Drobnig & H. Kotz eds. 1981); P. Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, in *L'ARBITRAGE INTERNATIONALE PRIVE ET LA SUISSE* (Mémoires publiés par la Faculté de Droit de Genève No. 53, W. Wenger and P. Lalive, eds. 1976). Each of these works also contains a bibliography.



substantial similarity in result reached by legal systems with quite different points of departure, and convergence in the international arena that seems to be helped along by the process of transnational decision-making.

In roughly half the arbitrations in which I have been involved, there was an express choice of law clause, and that choice was always honored.<sup>35</sup> More often than not, the law chosen was that of the principal place of business of one of the parties, while the arbitration was at a neutral situs. Particularly in contracts with enterprises from developing countries, the attitude of Western contractors seems to have been, "You can choose the law, if we can choose the forum and means of dispute settlement."

What if no governing law is designated in the contract? Several alternatives are suggested in the literature.<sup>36</sup>

(i) *The arbitrators should apply the law applicable at the place where the arbitrations is held—i.e., the maxim (popular especially in England) "qui elegit judicem elegit ius" should be applied to arbitration agreements specifying a situs for the arbitration as it would be to choice of a judicial forum.*<sup>37</sup>

I have never formally encountered this proposition in an arbitration, possibly because I have never sat in London. The disposition to "do things our way," of course, persists whenever arbitrators, and particularly the chairman, sit in their own home base, though less, I think, on matters of substance than on the procedural issues discussed in the previous sections of this article. In my view, this alternative has little to recommend it. If the parties had wanted to say "the law applicable at the situs of the arbitration governs the contract," they could easily have done so, and the omission of such a provision suggests rather the reverse: the parties were able to agree on arbitration to settle future controversies and then added a situs, but either they did not think about or they could not agree on a governing law. The choice of Geneva or Paris or London or New York as the

35. Such a clause would not, I expect, be honored if the law was chosen to evade a mandatory provision of national law, for example an export control applicable in the place from which goods were to be exported. For an instance of such a case, arising out of an arbitration, see *Regazzoni v. K.C. Sethia (1944) Ltd.*, [1958] A.C. 301.

36. Not all the possible alternatives are discussed here, and the formulations adopted by the writers cited in note 34 differ. The article by Lando contains the draft of "Recommendations on the Law Applicable to International Contracts" to be submitted to the International Chamber of Commerce. Lando, *supra* note 34. So far as I am aware, no action has been taken on these recommendations.

37. For a decision of the House of Lords discussing the maxim "he who chooses the forum, chooses the law," and stating that it is too rigid to be uniformly applied, see *Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A.*, [1971] A.C. 572, *reversing* [1969] 1 W.L.R. 1338 (C.A.). While this case arose out of an arbitration, it seems that the toning down of the maxim from a rigid rule to a rebuttable presumption applies to the choice of judicial forum as well as to choice of a situs for arbitrations.

situs of an arbitration is more likely to be related to travel schedules or the perception of traditional neutrality, such as in Geneva, than to any study of the law of commercial transactions applicable at the situs chosen.

(ii) *The arbitrators should apply the choice of law rules applicable at the place where the arbitration is held.*<sup>38</sup>

This alternative, analogous in the international arena to the rule of *Klaxon v. Stentor* for federal courts in the United States,<sup>39</sup> seems to me no more persuasive than alternative (i). Surely parties to a contract do not consciously choose any state's conflict of laws rules, whether directly or by implication. But I have never as arbitrator had to insist on the point, because in cases that I have participated in, alternative (ii) tended to point to the same source of law as alternative (iii), which leaves the choice of law to the arbitrators.<sup>40</sup> For example, if seller in an international sales contract fails to deliver and claims *force majeure*, it would seem that that term should be defined at the place where seller asserts it was prevented from performing; if there is a dispute about a warranty, the law applicable at the place where the merchandise is to be used should govern. Whether this result is reached directly, or indirectly by following the choice of law rules of the situs of the arbitration, probably does not matter, so long as antiquated rules looking to the place of contracting do not prevail at the situs.<sup>41</sup>

38. The *Compagnie Tunisienne* case, [1971] A.C. 572, seems to be an illustration of this alternative, in that, once the inference of the law of the situs is held to be rebuttable, English conflict of laws doctrine determines the law to be applied by the arbitrators. Among the important advocates of this alternative was M.G. Sauser-Hall, who recited it as chairman of the famous *Aramco* arbitration, *Saudi Arabia v. Arabian American Oil Company (Aramco)*, 27 I.L.R. 117, 156 (1958) (Sauser-Hall Arb.) and developed it, *inter alia*, in Sauser-Hall, *L'Arbitrage en droit international privé*, [1952] 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 394. Resort to the choice of law rules of the situs of the arbitration is reflected in a proposed rule of the 1957 Session of the Institut de Droit International, for which Sauser-Hall was Rapporteur. Resolution Concerning Arbitration in Private International Law art. 11, as adopted by the Institute of International Law at its Session at Amsterdam, Sept. 18-27, 1957, [1957] 2 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 491, 496. The UNCITRAL Model Law, *supra* note 33, expressly rejects this approach in article 28(1).

39. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (in actions brought in federal courts under the diversity jurisdiction, the choice of law rules of the state where action is brought, not independent federal conflict of laws rules, must be applied).

40. If my experience on this point is typical, it suggests that choice of law with respect to commercial contracts is not as disorganized as either the revolutionary or the counter-revolutionary scholars of conflict of laws would have us believe. The literature on this subject is of course vast, and well beyond the scope of this essay. For a convenient start, see *The Influence of Modern American Conflicts Theories on European Law*, 30 AM. J. COMP. L. 1-146 (1982).

41. A modified version of this alternative, which I also know only from the literature and not from experience, would say that if, according to the law of the place of the arbitration the parties could not choose the law they in fact chose in their contract, then the arbitrators may not give effect to the parties' choice of law. See, e.g., Klein, *supra* note 34, at 193-94 and the sources there cited.

(iii) *The arbitrators should make their own choice of law, independently of the law of the place where they sit.*

If the choice is obvious, or if the arbitrators feel confident on the subject of conflict of laws, this is a convenient alternative, because it cuts out a step in research and argument, and enables counsel and the tribunal to consider the underlying case early in the arbitration.<sup>42</sup> If, as is usually the case, the consequence of the choice of a particular state's law is not immediately apparent, a good technique is for the arbitrators to invite the parties early on—for instance at the meeting to settle the terms of reference called for by the ICC Rules<sup>43</sup>—to agree that the laws of state X will be applied to the dispute. If neither side objects strenuously, the choice between (ii) and (iii) may not have to be specified: the arbitration will be conducted as if the parties had agreed on the applicable law in their original contract. Some counsel are nervous about such an invitation, and are reluctant to give their formal agreement to a question they have not carefully researched; if the arbitrators announce their tentative inclination to apply the law of X, however, that is usually all that is necessary. I have never been in an arbitration in which the parties devoted major resources to argument about choice of the applicable law. More common, in my experience, is an argument really directed to alternative (iv): “We believe the law of A is applicable, and under that law our client is entitled to prevail. But even if the law of B were applied, the result would be the same.”<sup>44</sup>

(iv) *The arbitrators should postpone the question of choice of law until it is needed.*<sup>45</sup>

If for instance, the law of either the buyer's or the seller's principal place of business applies (or, say, either the law of the shipowner or that of the charterer),

42. Article 13 of the ICC Rules provides:

- (3) The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrators shall apply the law designated as the proper law by the rule of conflict of laws which he deems proper.
- (5) In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages.

ICC RULES, *supra* note 19, at art. 13(3), 13(5). To similar effect, see UNCITRAL Rules, *supra* note 19, at art. 33.

43. See ICC RULES, *supra* note 19, at art. 13. It is not obligatory under this article to have a meeting, and in cases in which the amount in dispute is not large the terms of reference are often negotiated by telephone and telex.

44. A variation on this alternative, advocated by the former Secretary General of the ICC Court of Arbitration, is to look at all the choice of law systems that have any connection with the parties or the transaction: if they all point to the same choice of law, for example, to the law of the seller's domicile or of the flag of the ship, that law is applied. See Derains, *L'Application cumulative par l'arbitre des systèmes de conflit de lois intéressés au litige*, 1972 REVUE DE L'ARBITRAGE 99, 103.

45. For a criticism of this alternative as a “no-rule approach,” see Lando, *supra* note 34, at 166.

the tribunal will wait and see if there is a legal issue at all in the case, then see if the relevant law of state A or B is different, and only if both of these conditions obtain, make a decision on the applicable law. Of course, if the choice is postponed until it has been determined to be critical, the decision should probably be made only following submissions (oral or written) on behalf of the parties. These submissions, in turn, may incorporate, in effect, alternatives (i), (ii), or (iii).

A substantial school of thought regards alternative (iv) as theoretically unsound, because it implies that arbitrators can function without an anchor to law.<sup>46</sup> American lawyers, on the one hand less concerned about theory, and on the other hand trained through study of constitutional law in the Supreme Court to postpone issues until their decision cannot be avoided, seem to be less bothered by this approach than their European counterparts. My own experience suggests that the difference in the substantive law of most states with regard to such issues as when a contract is formed, what are the duties of buyer and seller, owner and contractor, and similar staples of contract disputes are slight, even when the sources of law and the formulations of the rules differ considerably. Leaving aside matters of family law, inheritance, and administrative law, which virtually never figure in the type of arbitration under discussion, the major differences seem to concern such questions as *force majeure* and (for states influenced by Islamic law) the availability of interest and substitutes therefor. This (over)statement is not to be taken as a condensed milk version of comparative law; it suggests only that alternative (iv) has a good deal to be said in its favor.<sup>47</sup> Sometimes alternative (iv) runs into alternative (v), in that the award may simply say "The tribunal interprets the intention of the parties as containing the following obligations. . . . In our view, Respondent failed to carry out the third obligation and claimant was damaged to the extent of \$X. . . ." without ever stating the law under which that conclusion was reached. Perhaps the better form would be to add a statement that this conclusion may be supported by the law of state A as well as by the law of state B; the point, however, is that the choice of law was not in fact critical to the progress of the arbitration, or to the award.

For a more favorable view based essentially on the American concept of "false conflict," see Croff, *supra* note 34, at 632.

46. See, e.g., Mann, *Lex Facit Arbitrum*, in *INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE* 157, 160 (P. Sanders ed. 1967):

[No one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects].

*Id.*

47. To the extent this point is persuasive, it also suggests that, contrary to some writers, choosing the applicable law in a contract may not be the most important thing, and that the position of "you can choose the law if we can choose the forum" mentioned above, is a sound bargain.

(v) *The arbitrators should apply lex mercatoria.*

Finally, some arbitrators and scholars contend that there is a law of international trade not linked to any particular state—a so-called law merchant or *lex mercatoria*. Professor Goldman of Paris, himself an experienced arbitrator and an authority on both international law and commercial law, has been the leading exponent of this approach in print.<sup>48</sup> I do not want here to engage in the debate, which has already engendered considerable writing in legal journals, particularly in Europe,<sup>49</sup> about the legitimacy of arbitrators applying a law that no relevant legislature has enacted and no authoritative court has announced.<sup>50</sup> I think in fact many arbitral decisions make use of this approach, often without fully articulating it, and without an express discussion about whether an international law merchant really exists.

Does such a body of law—that is, a system of obligation, and remedy going beyond custom—exist? On such issues as seller's duty to comply with specifications and buyer's duty to pay for accepted goods and to give prompt notice of rejection, the law of practically all states is the same; thus the difference between alternative (iv) and (v) is likely to be negligible, and the result would probably be the same under any of the other alternatives as well. Where resort to an international law of commerce and contract—openly or *sub silentio*—may make a difference is in such subjects as the consequence of unforeseen events, the duty of dealing in good faith, and the obligation to mitigate damages. Of course these are not subjects unknown in national laws, but I think they are subject to a special understanding in the context of international transactions—understanding by merchants and by those called upon to decide controversies between them.

Perhaps the best example is the law relating to *force majeure*. Suppose buyer and seller contract for a sale of merchandise from India to Italy, seller contends he is unable to perform within the stated price and time, because the Suez Canal is once again closed as a result of a Middle East crisis. National law might either discharge the seller completely, or hold him fully liable.<sup>51</sup> A jurisprudence of commercial reality would probably conclude that each side assumed a portion of the risk that the Canal might not remain open, that it would be unfair to place the loss solely on either party, and that the loss should be shared in some proportion, depending on the circumstances.

48. See, e.g., Goldman, *Les Conflits de lois dans l'arbitrage international de droit privé*, 109 RECUEIL DES COURS 347, 542 (Hague Acad. Int'l Law 1963).

49. For a convenient discussion of the literature, see Klein, *supra* note 34.

50. This discussion assumes—as has been my unbroken experience—that the arbitrators have not been asked to function as amiable compositeurs, or to decide *ex aequo et bono*.

51. For an example of the latter, see the decision of the British House of Lords in *Tsakiroglou & Co. Ltd. v. Noble Thorl G.m.b.H.*, [1962] A.C. 93. For criticism of this and similar decisions, see Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things—The Doctrine of Impossibility of Performance*, 23 RUTGERS L. REV. 419 (1969).

To take a similar illustration, suppose in an arbitration arising out of an international sales contract seller in state X demonstrates that he was unable to furnish the goods in question in the time prescribed because of a dock strike in X which lasted 37 days. The contract either contained no provision concerning *force majeure*, or continued a very general "subject to *force majeure*" clause.<sup>52</sup> Should the arbitrators look to see whether case law in State X would regard the contract at an end without liability? Depending on the character and intended use of the goods, and perhaps some facts about prior dealings of the parties or the industry, I would think the arbitrators should, and generally would, feel themselves free to award that the required performance was postponed for the length of the strike (and perhaps a few additional days), but that thereafter seller was obligated to ship, and buyer was obligated to take. In other words, *lex mercatoria*, corresponding to the expectations of the parties, provides that the obligations arising from the contract are suspended, not canceled.

I do not think it is necessary to set up a law of international commercial transactions against the law of particular states, which typically does not make special provisions for international, as contrasted with internal, transactions. For example, in an international arbitration in which I sat, which I will call *Buyer v. Seller*, Seller failed to complete an international shipment to Buyer. Seller claimed *force majeure*, but was unable to establish it to the satisfaction of the arbitrators. Buyer, however, was a middleman, who had a contract to resell to his customer in a third country. When it appeared likely that the shipment would not go forward, the customer offered to settle with Buyer for \$1.50 per unit; had Buyer paid that sum to Customer and then reclaimed that amount in the arbitration against Seller, the arbitrators would surely have awarded him full recovery. It turned out, however, that Buyer had "passed on" the settlement offer by proposing a settlement to Seller for \$3.50 per unit, without disclosing Customer's offer. This seemed unfair to the arbitrators—a departure from the good faith required of merchants, and therefore to call for a reduction in the damages to be awarded to Buyer.

Of course, it would have been possible in this, as in other cases, to point to a provision in the civil or commercial code of the state whose law was applicable calling for obligations to be carried out in good faith; but the elements of good faith or fair dealing, as seen by the arbitrators, came not from the internal law of a given state, but from perceptions of the arbitrators about how merchants in international transactions generally do behave and expect each other to behave. Thus, I see alternative (v) only partly as a liberation from or alternative to the

52. For a sample of this and similar clauses, as well as more elaborate clauses and contracts with no provisions at all on the subject, see A. LOWENFELD, *INTERNATIONAL PRIVATE TRADE* 84–89, DS7-75 (2d ed. 1981).

other four alternatives: I see the denomination of *lex mercatoria* as an attempt, only partly successful, to give doctrinal support to what arbitrators actually do.<sup>53</sup>

### III. CONCLUSION

Is arbitration of international commercial controversies then, in the end, truly alternative dispute settlement, and not merely a substitute for litigation in national courts? I think the answer is yes: an international arbitration is not a mirror image of any given court or source of law, but a series of imperfect reflections and adaptations. Viewed as a process, arbitration works (usually), because the different national procedures, if not quite “plug compatible,” as the computer people say, turn out on the whole to be adaptable. Viewed as a search for substantive legal solutions, it turns out that the traditions of the different legal systems have quite a lot in common. Thus, the participants—arbitrators and counsel—come to understand each other in the course of an arbitration even if they did not at the outset.

This generalization should not be exaggerated. It does not apply to fields that are on one side too personal and private, such as inheritance, support and custody, and on the other side too public and too affected with national interest, such as competition law, securities regulation, or export control. In the vast middle arena in which international commercial arbitration typically operates, I think the legal solutions tend to converge, whether the starting point is West European, East European, Anglo-American, or Islamic.<sup>54</sup> The convergence does not, of course, lead to complete congruence, but it does, in my experience, lead to an area of similarity, a spectrum not as wide as might have been supposed, within which international commercial transactions are carried on and controversies are resolved.

If this conclusion is, in general, sound, it seems to me that international arbitration offers an additional benefit, that may not interest counsel focusing on an individual dispute, but should interest arbitrators, observers of the process, and indeed counsel who are involved in international transactions on a recurring basis. Where the “international solution”—the *lex mercatoria*, if you will—is

53. For a fascinating episode involving litigation up to the supreme courts in two countries because the arbitrators candidly said they were applying *lex mercatoria* and not any national law in requiring good faith dealings between a principal and an agent, see *Pabalk Ticaret v. Norsolor*, summarized in 24 I.L.M. 360 (1985). Though the length and costliness of the dispute suggest that the candor of the arbitrators may not have been wise, it was ultimately held by the Supreme Court of Austria (the seat of the arbitration) that application of *lex mercatoria* did not justify setting the award aside, and by the French Cour de Cassation that it did not render the award unenforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

54. I assume the same could be said with respect to other systems—for instance those from the Far East—but I have not had any experience with them.

significantly different from the solution of one's own country's law, international arbitration provides the other side of the mirror: Once it appears that the solution in one's own country is not inevitable, it does not require a great leap to question whether that solution is even the right one. Thus international arbitration, like conflict of laws, not only broadens the horizon, but may well contribute to enlightened introspection—of process, and of substance.